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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1518

VOLKSWAGEN OF AMERICA, a corporation,
and
VOLKSWAGENWERK A.G., a corporation,
Petitioners,

vs.

PHYLLIS A. ROSSELL, guardian ad litem
of **JULIE ANN KENNON,** a minor,
Respondent.

PETITIONERS' REPLY IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

	Page
Cases:	
Bluth v. Laird, 435 F.2d 1065 (4th Cir. 1970)	3
Brinkerhoff-Faus Trust Co. v. Hill, 281 U.S. 673 (1930)	2
In re Asbestos Litigation, No. 85-381, slip op. (D.N.J. 1986)	4
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	3
N.L.R.B. v. Welcome-American Fertilizer Co., 443 F.2d 19 (9th Cir. 1971)	3
United States v. Nixon, 418 U.S. 683 (1974)	3
Statutes and Rules:	
Arizona Constitution, article VI, § 5(3)	3
Rule 49.2, Rules of the Supreme Court	2, 4
Rule 702, Arizona Rules of Evidence	2
Rule 23(f), Arizona Rules of Civil Appellate Procedure	3
Other Authorities:	
M. Udall & J. Livermore, *Law of Evidence* (2nd ed. 1982)	2

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Petitioners Volkswagen of America and Volkswagenwerk A.G. hereby reply in support of their petition for writ of certiorari to review the decision of the Supreme Court of the State of Arizona.

REASONS FOR GRANTING THE PETITION

Respondent, in her Brief in Opposition to the Petition, distorts and mischaracterizes Petitioners' arguments, as she has done at all stages of this litigation. Respondent's arguments against granting the petition are: (1) that the constitutional issues were not timely raised; (2) that the distinction between professional and nonprofessional defendants in negligence cases was not newly created by the

Arizona Supreme Court and product manufacturers are entitled to no special privileges; (3) that no due process violation occurred by virtue of the Arizona Supreme Court's disregard of its own rules because that court has jurisdiction under the state constitution to decide all issues necessary to the resolution of the case; and (4) that sanctions for a frivolous petition should be imposed pursuant to Rule 49.2, Rules of the Supreme Court. All of these arguments lack merit. More importantly, Respondent has not even attempted to refute Volkswagen's argument that the state court's reliance on facts not contained in the record violated due process of law.

Respondent wrongly contends that Volkswagen failed to raise the constitutional issues addressed in its petition in a timely fashion. The constitutional violations there alleged are each premised upon the manner in which the Arizona Supreme Court decided this case. Volkswagen, being less than omniscient, had no advance indication that the court would trample Volkswagen's substantive constitutional rights in deciding the case. Thus, the constitutional arguments were timely, even though they were not raised until the motion for reconsideration. *See, e.g., Brinkerhoff-Faus Trust Co. v. Hill,* 281 U.S. 673, 677-78 (1930) (if federal question is created by an unexpected decision of the highest state court, the fact that the federal issue is not briefed until a motion for reconsideration does not defeat the Supreme Court's authority to review the issue).

Respondent's contention that courts previously have distinguished between "professional" and "nonprofessional" defendants for purposes of determining the standard of proof in negligence cases is patently untrue. Respondent cites no authority for this position and does not dispute the contrary authority cited in the petition. *See* Ariz. R. Evid. 702; M. Udall & J. Livermore, *Law of Evidence* § 25, p. 43-44 (2nd ed. 1982). Rather, Respondent attempts to change the focus of the inquiry by suggesting that Volkswagen is trying to obtain some special preferential treatment for product man-

ufacturers. It is this kind of distortion of Volkswagen's arguments that contributed to the miscarriage of justice in the state court, and should be given short shrift in deciding the merits of the petition for writ of certiorari. The focus of the inquiry must remain on the decision of the Arizona Supreme Court and whether that court's newly created distinction between professional and nonprofessional defendants violates Volkswagen's equal protection rights under the Fourteenth Amendment of the United States Constitution.

Respondent's third argument demonstrates her total failure to comprehend Volkswagen's contentions. Respondent asserts that because the state court is authorized to decide all issues necessary to resolve an appeal, *see* Ariz. Const. art. VI, § 5(3), it did not deny due process to Volkswagen by failing to specify the issues on which review was granted. Volkswagen does not contend that the court lacked authority under the state constitution to decide all of the issues in the case. Rather, Volkswagen maintains that the court failed properly to exercise its authority. Rule 23(f) of the Arizona Rules of Civil Appellate Procedure, promulgated by the Arizona Supreme Court, requires the court, in its order granting review of a case, to specify the issues which are to be reviewed. Here, in response to Volkswagen's request for specification filed pursuant to Rule 23(f), the Arizona court stated that review was granted on both issues decided by the Court of Appeals. Yet, the state court proceeded thereafter to consider issues not addressed by the Court of Appeals. Hence, even though the state constitution conferred authority to review all issues in this case, the state court's failure to follow its own procedural rules regarding the specification of the issues to be reviewed denied Volkswagen due process. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-34 (1982); *United States v. Nixon*, 418 U.S. 683, 696 (1974); *N.L.R.B. v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir. 1971); *Bluth v. Laird*, 435 F.2d 1065, 1071 (4th Cir. 1970).

Respondent's final argument is that this Court should impose sanctions for a frivolous appeal pursuant to Rule 49.2, Rules of the Supreme Court. The issues raised in the petition clearly are not frivolous. In *In re Asbestos Litigation*, No. 85-381, slip op. (D.N.J. 1986), a fourteen-judge panel of the district court considered whether a New Jersey rule, which distinguishes among various classes of product manufacturers with regard to the availability of the "state-of-the-art" defense in strict liability actions, violated the equal protection clause. That issue essentially is indistinguishable from the issue raised in the present case. Although the district court upheld the constitutional validity of the distinction, the panel split eight to six. Any issue upon which there could be such a marked difference of opinion cannot be characterized as frivolous.

CONCLUSION

Respondent has mischaracterized the arguments advanced by Volkswagen instead of responding to them. Under the relevant precedents, the decision of the Arizona Supreme Court violated Volkswagen's right to due process of law and to the equal protection of the laws. Consequently, a writ of certiorari should be granted to review the decision of the Supreme Court of Arizona.

Respectfully submitted,

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